No. 21,741

IN THE

United States Court of Appeals

For the Ninth Circuit

THE ANACONDA COMPANY,

Appellant,

vs.

GREAT FALLS MILL AND SMELTERMEN'S UNION No. 16 of the INTERNATIONAL UNION OF MINE, MILL AND SMELTERWORKERS, and THE INTERNATIONAL UNION OF MINE, MILL AND SMELTERWORKERS,

Appellees.

BRIEF OF APPELLEES

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BRIEF OF APPELLEES

STATEMENT OF JURISDICTION

Appellees concur in appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Appellees do not concur in the statement of the case prepared by appellant in the following respects:

1. The work stoppage was not a "wildcat" strike (Ap. B. p. 2). It resulted from inability to negotiate rates on new jobs (Tr. p. 7) and resultant economic coercion on the part of the employer (Tr. p. 8) which

included a general discharge—although the arbitrator characterized the work stoppage as a strike (Tr. p. 7). While not relevant to this appeal, the stoppage was not a "wildcat" strike, but a protected economic activity.

2. Appellant glosses over the circumstances surrounding the settlement of the work stoppage and neglects to state that the basis for the original grievance came upon the union's insistence that the company had agreed to recall men on the basis of seniority in the settlement of the strike; the union contending that the employer had agreed to recall on plant seniority basis and the employer contending for recall on a departmental seniority basis and claimed to have recalled on such basis. On the issue the arbitration resulted (Tr. p. 8).

3. Appellant's analysis of the arbitrator's decision is argumentative and has no proper place in the statement of the case; and must be viewed in the proper factual perspective. The issue upon which the arbitrator was called was whether or not the employer had applied the seniority provisions of the agreement in the recall. The union contended that plant seniority should have been applied (Tr. p. 8). The arbitrator found that departmental seniority had been agreed to and that the employer had failed to correctly apply it (Tr. pp. 7-10).

At the time of submission to the arbitrator the parties stipulated that the mechanics of computing return dates and seniority dates was sufficiently automatic as to require no specific decisions thereon by the

arbitrator, should he rule in favor of the union (Tr. pp. 7-10).

4. The collective agreement which bottoms the arbitration makes specific reference to the scope and binding effect of arbitration (Tr. p. 54, Art. 8, §§ 6, 7).

> "§ 6. Matter to be Considered by Arbitrator:
>
> In considering the application and interpretation of any provision of this agreement as it relates to the grievance submitted to arbitration, the arbitrator may also consider rules or regulations covering working practices and working conditions which have been established by custom or local agreement."

> "§ 7. Decision of Arbitrator:
>
> All decisions rendered as a result of any arbitration proceedings provided for herein shall be final and binding upon both parties."

ARGUMENT

SUMMARY

Appellant fails to set forth the context of the submission and thereby seeks to alter the reach of the matter submitted to the arbitrator, and a review of the arbitration itself.

The arbitrator's scope is established by the collective bargaining as well as the submission question, and the District Court correctly refused to reexamine the arbitration itself beyond inquiry into any want of fidelity to his obligation by the arbitrator.

Judicial review of arbitration should, and here correctly did, confine itself to inquiry into the existence

or nonexistence of an arbitration fairly considered by the arbitrator and operating within the framework of the collective bargaining agreement. Judicial substantive concurrence in the award is not a requirement for its validity.

SPECIFICATIONS OF ERROR

SCOPE OF ARBITRATORS

While listing four specifications, appellant divides argument into two general areas; and it appears that specifications I and IV and specifications II and III cover the same ground.

On I and IV, appellant argues that the court erred in holding that the arbitrator did not exceed the scope of his authority. Whether or not there was any specific contract term for application of seniority to the recall begs the question presented to the arbitrator. The scope of the arbitrator's authority is found in the collective bargaining agreement (Tr. p. 54) and not solely in the question submitted. Were the latter the case, however, the evidence presented by the company that it had not recalled in all cases according to seniority (Tr. p. 8) would suffice to support the award.

For the issue before the arbitrator was not whether in all strikes or stoppages the seniority provisions of the contract should be applied, but only whether under the particular circumstances of this dispute the company failed to apply the seniority provisions as agreed to in the resolution of the particular dispute. That was the question presented and that was the issue resolved. The lower court correctly sustained the award and re-

fused to reexamine the issues in arbitration. As the court stated in its holding in *Local 77, Musicians v. Orchestra Assn.*, 252 F. Supp. 787:

> "It [the award] resolved the exact question which was submitted in terms of the contract and its interpretation; it is therefore not subject to re-examination on the merits."

What appellant seeks here, and sought below, is a review of the merits in the absence of the record before the arbitrator. If the courts are to so do, it is submitted that, rather than the piecemeal review raised by appellant's specifications and argument here, the entire record should be reviewed.[1] Now appellant seeks to have unilaterally reviewed a part of its contention before the arbitrator. A contention advanced to support its position that it had not agreed to apply seniority on recall. If the company's contention merits review, then the union's contention that the men were discharged and therefore plant seniority should apply should also have been reviewed.

But appellees recognize that under the rules of the collective bargaining agreement the arbitrator's decision is final and binding and that endless reviews serve only to defeat the whole purpose of arbitration.

Thus, the specifications of error are not, in fact, directed at any error on the part of the District Court,

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[1]It is obvious from the record that the initial contention of the union was not supported by the award. They had contended for application of plant seniority and that this was their understanding at the time of resolution of the initial dispute when the company agreed it would recall the men by seniority. The arbitrator simply found that the employer did not apply seniority and so ruled.

but complaints of error on the part of the arbitrator—a back door review of the arbitration decision itself.

For instance, in specification number I appellant bases a scope of submission argument on the pretense that the arbitrator stated he found "no contract language to support his award." In fact the arbitrator states that the recall after strike situation is not specifically provided for, but goes on to say that the circumstances evidenced in this situation gave rise to the conclusion that the company "so interpreted the collective bargaining agreement" (Tr. p. 9); and wherein lies the arbitrator's error in relying upon agreements of the company agent and a past 1959 strike practice when the collective bargaining agreement itself spells out that these very matters may be always considered by the arbitrator (Tr. p. 54, Contract Art. 8, § 6).

Appellant cites *Carey v. General Elec. Co.,* 315 F. 2d 499, 508, wherein the court points out that the bounds of authority "as established in the collective bargaining agreement" should not be abused by arbitrators.

Again, appellant cites *Fomington Co. v. Metal Product Workers Union,* 237 F. Supp. 139. While distinguishable, and while appellees are not wholly in accord with that District Court ruling, it is significant that even there the bounds were premised upon the collective bargaining agreement.

Specification II is premised on a misstatement of the District Court holding. Nowhere does the court hold (or state) that the arbitrator's award was ambiguous. The court speculated on how the arbitrator

might have construed certain contract terms, but held (Tr. p. 35) that the first paragraph of the award was valid and binding upon both parties. In the speculation the court stated, not that the award was ambiguous, but that the arbitrator could reasonably and conceivably have made certain interpretations and that the court would not substitute its own opinion for that of the arbitrator (Tr. pp. 34, 35) and that the arbitrator's view did not demonstrate any infidelity to his obligation (Tr. p. 35).

At bottom, however, all the specifications rest upon a hypertechnical approach to the function of the arbitrator; an approach more in keeping with the old case by case system which preceded the adoption in collective bargaining agreements of general arbitration procedures as interim means of resolving disputes during a contract term; and as a substitute for strike actions in the non-economic dispute areas. That narrow doctrine was presumably laid to rest with *Lincoln Mills* and the *Steelworker* trilogy.

Textile Workers v. Lincoln Mills (1957) 353 U.S. 448;

Steelworkers v. Warrior Navigation Co., 363 U.S. 574;

Steelworkers v. American Mfg. Co., 363 U.S. 564;

Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593.

The specifications then, are merely an attempt to obtain a piecemeal review of the arbitration decision and award.

THE SCOPE OF JUDICIAL REVIEW

Inferentially, the appellant charges the District Court with error for not confining the arbitrator to the submission question. Yet this is precisely what the lower court did; and decided that the arbitrator could, without exceeding an arbitrator's authority, rule and award as he did. In so doing the District Court correctly applied the *Enterprise* case rule.

While not wishing to go beyond the District Court decision, it is submitted that the appellant seeks to expand the specific question submitted by changing the context of its submission. If confined to the specific question, the admission by appellant of failure to follow either seniority list en toto, supports an award to appellees' members.

But the decisions go beyond this narrow definition of an arbitrator's role, and look for basis of abuse of privilege to the collective bargaining agreement itself to define its scope of review. And where the arbitrator is not confined by specific limitation in his examination of a dispute, the courts do not add any such limitation. An intent to limit must be spelled out, *Local 1401 Retail Clerks v. Woodman's Food Mkt.*, 371 F. 2d 199.

In this case the arbitrator's scope is generalized by the terms of the collective bargaining agreement itself (Tr. p. 54, Art. 8, § 6).

Thus, in this case the District Court, if it erred at all, erred in confining the review to a scope even more restricted than the agreement. (Non-prejudicial to appellant.)

At the same time the District Court quite correctly refused to second guess the arbitrator by overly precise inquiry into the decision. An arbitrator need not even write a decision, or "give their reasons for an award", *Steelworkers v. Enterprise Wheel,* 363 U.S. 593; and the District Court gave reasonably full play to the means of dispute settlement chosen by the parties under the collective bargaining contract, bounding that procedure only with the fundamental precepts of fair play.

While in this case a more narrow inquiry was made by the District Court, even within that scope, it cannot be held that the court erred in not reopening a portion of the record only. Here, the court seemed to confine its inquiry to the language of the seniority clause rather than the scope of arbitration provided in the grievance clause. In so doing, the court finds that the arbitrator's analysis and conclusion is not unreasonable, biased, incredible, or any of the other adverbs which would indicate an infidelity to his obligation to arbitrate. As the United States Supreme Court implied and this court has stated, the parties chose the arbitrator to decide the dispute; not the judge.

Metal Trades Council v. General Electric Co. (CC 9, 1965) 353 F. 2d 302.

"It is not for this Court to say what the Board of Arbitration should do. That is up to the board, because under the Warrior and other cases, this Court cannot substitute its determination for the determination of the Board of Arbitration. That is what they bargained for in the collective bar-

> gaining agreement, that industrial peace was to follow the adoption of a contract of that kind which contemplates that you will secure not only the services of the arbitrator but also their know-how, their knowledge of the industry, their ability to know and to follow the rules applicable to labor negotiations."

There is no allegation here that the contract provides limitations on the arbitration; nor argument of partiality or corruption. *Cf. Local 1078 U.A.W. v. Anaconda Brass Co.,* 256 F. Supp. 686. Nor any manifest disregard of the law. *Wilks v. Swan,* 346 U.S. 427, 436.

CONCLUSION

It is manifestly correct that in the great majority of arbitrations, neither party wins a clear-cut victory. Problems so obviously determinable are rarely arbitrated.

And today, under the doctrine of the *Steelworkers* trilogy, the arbitrator becomes an integral part of the collective bargaining process. While in the instant case, the issue was clearly drawn, the argument sought by appellant would, in other cases, seek to make technical wording of the submission question override even the contractual premises of arbitration. To accord such weight to the question framed (where contract terms are not specifically modified) would make hazardous and overly encumbered by technicalities what is supposed to be a simple, speedy, and

peaceful procedure for settling disputes. Moreover, it would require a complete court review of each situation.

By unduly hampering the process by raising interpretive issues in each case, such a rule would in effect permit inferential amendment of the general obligation to arbitrate in each case. *Cf. Socony Vacuum Tanker Assn. v. Socony Mobil,* 369 F. 2d 480.

The District Court restrained its review, and refused to become a substantive appellate court for arbitration. In so doing it ruled correctly and should be sustained.

Dated, Helena, Montana,
February 24, 1968.

Respectfully submitted,
CHARLES V. HUPPE,
Attorney for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES V. HUPPE,
Attorney for Appellees.